UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

B.I.P. CORPORATION, Plaintiff, vs. MITECH TELECOM, INC., and DOES 1 to 30, Defendants.	CASE NO. 08-CV-0313-H (CAB) ORDER GRANTING MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

On April 8, 2008, Mitech Telecom, Inc. ("Defendant") filed a motion to dismiss the First Amended Complaint. (Doc. No. 5.) Plaintiff B.I.P. Corporation ("Plaintiff") has not filed any response to the motion. On May 8, 2008, the Court issued an order indicating that any opposition was late and that the Court intended to submit the motion on the papers. (Doc. No. 6.) The Court exercises its discretion under Local Civil Rule 7.1(d)(1) to submit the motion on the papers submitted thus far without oral argument. For the reasons set forth below, the Court grants the motion to dismiss.

Background

On February 19, 2008, Defendant removed this case from the Superior Court of California in San Diego based on diversity jurisdiction. (Doc. No. 1.) Plaintiff filed a First Amended Complaint ("FAC") on March 19, 2008. (Doc. No. 4.) The FAC asserts four causes of action for misappropriation of trade secrets, fraud and deceit, interference with prospective economic advantage, and breach of the covenant of good faith and fair dealing. This section summarizes the allegations as set forth in the FAC, and the Court's order of March 11, 2008, granting Defendant's request for judicial notice. (See Order Granting Def.'s Request Judicial Notice Supp. Notice Removal ("Order on RJN"), Doc. No. 3.)

Defendant is a Canadian corporation qualified to do business in California, with its principle North American office in Quebec. (FAC ¶ 1; Order on RJN.) Plaintiff is a California entity with its primary office in San Marcos, California. (FAC ¶ 2.) Plaintiff is in the business of purchasing and reselling telecommunications equipment, and Defendant was Plaintiff's primary supplier. (FAC ¶ 5.)

Plaintiff's claims are based on transactions that took place between the parties in San Marcos, California. (FAC ¶ 3.) On or about October 24, 2006, the parties, through their agents or employees, met in San Marcos and entered into an oral agreement. (FAC ¶¶ 6-7.) At that time, Defendant promised: (1) to continue to sell telecommunication products to Plaintiff; (2) to set aside a warehouse space, or "cage," in Canada where it would store Plaintiff's products; (3) to ship products as needed by Plaintiff to Plaintiff or its customers. (FAC ¶ 7.) Furthermore defendant expressly warranted that each product would be in working condition and free of defects, and defendant agreed to extend this warranty to each consumer purchasing from Plaintiff for 2 years following delivery, and 29 months for a product purchased and stored in the cage prior to shipping. (FAC ¶ 7, 28.) The oral contract was later modified, though the FAC does not specify the nature of the modification. (FAC ¶ 70.) As part of this agreement, Plaintiff agreed to purchase approximately $2.8 million in equipment from Defendant. (FAC ¶ 70.)

In 2007, Plaintiff purchased over $5 million of equipment for resale to its customers. (FAC ¶ 8.) From January 2003 to June 2007, Plaintiff cultivated an economic relationship with more than 100 customers. (FAC ¶ 53.) Sales to some individual customers exceeded $100,000 per year. (FAC ¶ 53.) Plaintiff maintained a list of its customers that was the result of a substantial investment of time, energy, and money. (FAC ¶ 13.) Plaintiff protected its list by only providing the information to employees who needed the information to perform their duties. (FAC ¶ 14.)

On or about January 8, 2007, Defendant's vice president of sales met with Plaintiff in San Marcos to respond to complaints regarding defective products. (FAC ¶ 9.) At that meeting, the vice president admitted that the products delivered had defective power supplies. (FAC ¶ 9.) Around July 2007, in response to a request from Plaintiff, Defendant falsely assured Plaintiff that each of the defective products had been tested, repaired, and returned to Plaintiff's cage. (FAC ¶ 10, 20-22.) Around June 2007, Plaintiff asked that all products from the cage be sent to San Marcos, where Plaintiff determined that many of the products were defective. (FAC ¶ 11, 26.) In good working condition, these products would have had a fair market value of approximately $2 million. (FAC ¶ 12.)

Around May 2007, Defendant requested Plaintiff's customer list on the promise that it would use the list to ensure that it did not compete with plaintiff. (FAC ¶ 15.) Instead, beginning around June 2007, Defendant used the list to sell its equipment directly to Plaintiff's customers at lower prices. (FAC ¶ 17.) Around August 2007, Defendant also notified Plaintiff that it was cancelling its warranties on any products sold to Plaintiff for resale. (FAC ¶ 17, 29.) As a result, Plaintiff is unable to sell the $2 million in equipment sent from Defendant. (FAC ¶ 18.)

Discussion

I. Legal Standard for Rule 12(b)(6) Motion

Defendant challenges each of Plaintiff's causes of action for failure to state a claim. Rule 12(b)(6) permits dismissal of a claim either where that claim lacks a cognizable legal theory, or where insufficient facts are alleged to support the claim's theory. See Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). While a claim does not need detailed factual allegations to survive a motion to dismiss, a party's obligation to provide the grounds of its entitlement to relief requires "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." See Bell Atlantic Corp., 127 S. Ct. at 1964-65. Rather, to survive a motion to dismiss pursuant to Rule 12(b)(6), factual allegations must be sufficient, when taken as true, to raise a right to relief above the speculative level. Id. at 1965. A complaint may proceed even though proof seems improbable or recovery is very remote and unlikely. Id.

II. Fraud and Deceit

Under Rule 9(b), a party must plead the circumstances constituting fraud with particularity, except any required mental state, which a party may plead generally. Fed. R. Civ. P. 9(b). If a fraud claim is not pled with sufficient particularity, a court may dismiss it for failure to state a claim. See Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001). Allegations of fraud must include the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (quoting Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)).

Plaintiff provides only approximate indications of the times involved, and does not identify the individual speaker or writer for many of the alleged statements. Plaintiff identifies one individual by role, the vice president of sales, and sets forth the general nature of the allegedly fraudulent assertions. These details, however, are not enough to overcome the lack of specificity in other respects, such as those mentioned here. Therefore, the Court dismisses the fraud claim for failure to plead with sufficient particularity.

III. Breach of the Covenant of Good Faith and Fair Dealing

Defendant argues that there can be no breach of contract action because the alleged oral contract is governed by the statute of frauds. Under California Civil Code § 1624(a)(1), a contract is invalid if the agreement "by its terms is not to be performed within a year from the making thereof." The alleged contract included a warranty of at least 2 years. (FAC ¶ 7.) Since full performance of this warranty necessarily required more than one year, the Court concludes that the statue of frauds would apply to the contract as alleged. See Dallman Co. v. S. Heater Co., 262 Cal. App. 2d 582, 588 (1968) (concluding that parol contract to guarantee and service heaters for 15 months violated statute of frauds); see also Pac. States Enters., Inc. v. City of Coachella, 13 Cal. App. 4th 1414, 1425 (1993) (holding that there can be no action for breach of implied covenant of good faith and fair dealing absent allegation of a valid contract). Plaintiff does not allege a written contract signed by Defendant, and this claim fails as a matter of law.[1]

Defendant also raised various arguments challenging the availability of tort remedies for a breach of the covenant of good faith and fair dealing. See, e.g., Foley v. Interactive Data Corp. 47 Cal. 3d 654, 682-700 (1988) (discussing circumstances in which tort remedies may be available for breach of covenant of good faith and fair dealing). Since the Court concludes that Plaintiff has not properly alleged a breach, it declines to reach this issue. The Court dismisses the claim for breach of the covenant of good faith and fair dealing.

IV. Misappropriation of Trade Secrets

Defendant argues that Plaintiff has failed to adequately allege that its customer list is a trade secret. Under California law, which is based on the Uniform Trade Secrets Act, a trade secret must both: (1) derive "independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use;" and be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d). Defendant points to a failure to plead reasonable measures to protect the secrecy of Plaintiff's customer list. Furthermore, Defendant argues that Plaintiff cannot have a trade secret since it disclosed the list to Defendant without entering into a secrecy agreement. Since Plaintiff did not oppose these arguments, and Plaintiff's claim could benefit from additional clarity in this area, the Court will dismiss the claim and provide Plaintiff an opportunity to amend.

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[1]The Court also notes that, to the extent the alleged contract might be considered a contract for the sale of goods for more than $500, the U.C.C. statute of frauds may apply. See Cal. Com. Code §§ 2106(1), 2201(1). The parties may wish to consider this issue in future proceedings, though the Court expresses no opinion on it at this time.

V. Interference with Prospective Economic Advantage

Defendant's challenge to this claim is tied to its challenge to the claim for misappropriation of trade secrets. Defendant argues that if the trade secret claim fails, this claim must also fail since Plaintiff's theory of interference relies on the alleged misappropriation. Plaintiff has not offered any opposition. Since Plaintiff's theory of tortious interference presupposes a misappropriation, and the Court has dismissed that claim, the Court also dismisses the claim for interference with prospective economic advantage.

VI. Leave to Amend

When a court concludes that a complaint fails to state a claim, the court generally grants leave to amend unless the pleading could not be cured by the allegation of other facts. See Doe v. United States, 58 F.3d 494, 497 (9th Cir.1995) As a result, the Court will provide Plaintiff with an opportunity to amend pleadings.

Conclusion

For the reasons set forth above, the Court GRANTS Defendant's motion to dismiss. Plaintiff may file an amended complaint consistent with this order on or before **June 23, 2008**.

IT IS SO ORDERED.

DATED: May 22, 2008

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT

COPIES TO:
All parties of record.